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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. [redacted]180

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Holding Corporation, Owen Gowen, Dewey E. Kinney, et al.,

Petitioners,

vs.

THE UNION BANK OF ARIZONA, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Respondents.

Petition to the Supreme Court for a Writ of Error to the [redacted]

BRIEF FOR PETITIONERS.

[redacted]

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No. 574

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, OSCAR COURTIN, DOROTHY E. KNIGHT, et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Respondents.

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

I.

STATEMENT OF THE CASE.

This matter comes before the Supreme Court upon certiorari to the Circuit Court of Appeals for the Ninth Circuit.

The bankrupt estate of the West Coast Rubber Corporation was administered before A. B. Kreft,

Esq., referee in bankruptcy at San Francisco. Certain labor claims were filed against the estate and the referee allowed them for the total sum of $917.85 as entitled to priority of payment under the provisions of Sec. 64b (4) of the bankruptcy act. These claimants also presented claims for costs incurred in attachment suits commenced prior to bankruptcy in an endeavor to collect their claims. These attachment costs claims were allowed for the total sum of $99.70 as entitled to priority of payment under the provisions of Sec. 64b (5) of the bankruptcy act, as the same was construed by the Circuit Court of Appeals for the Ninth Circuit in the case of *In re Amoratis,* 178 Fed. Rep. 919.

The United States Government presented a claim for manufacturer's excise tax which was finally allowed by the referee for $1851.66. The City and County of San Francisco, a municipal corporation, presented a claim for personal property taxes, which was finally allowed for $904.26.

It appeared that there was not enough money in the estate to pay all of these claims in full, although there was sufficient to pay either the tax claims in full or the labor and attachment costs claims in full. The question then arose as to what claims should be paid first.

The referee decided that labor and attachment costs claims should be paid first. This decision was affirmed by District Judge Dooling of the Northern

District of California, but was reversed by the Circuit Court of Appeals for the Ninth Circuit, which held that the tax claims should be paid before the labor and attachment costs claims. The referee, in his order, set out in detail his views upon the legal questions involved (Trans. of Record, pp. 34-50). On review of the referee's decision he filed his certificate, wherein he discussed further the legal matters involved (Trans. of Record, pp. 53-56). Judge Dooling, in connection with his decision, wrote a short opinion (Trans. of Record, p. 57). The opinion of the Circuit Court of Appeals appears in Trans. of Record, pp. 61-63.

II.

STATUTES INVOLVED.

The case at bar involves the construction of Secs. 64a and 64b (4) and 64b (5) of the Bankruptcy Act.

III.

QUESTION PRESENTED.

The sole question presented is whether the tax claims referred to in Sec. 64a of the Bankruptcy Act are to be paid prior to the labor claims referred to in Sec. 64b (4) of the act, and attachment costs claims in California covered by Sec. 64b (5) of the act as construed in the case of *In re Amoratis,* 178 Fed. Rep. 919, by the Court of Appeals for the Ninth Circuit.

ARGUMENT.

IV.

1. A REASONABLE CONSTRUCTION OF SECTION 64, SUBDIVISIONS "A" AND "B" OF BANKRUPTCY ACT, ESTABLISHES THE FOLLOWING ORDER OF PRIORITY IN THE DISTRIBUTION OF THE ESTATE:

(1) Expenses of preserving estate. Sec. 64b (1).
(2) Filing fees. Sec. 64b (2).
(3) Expenses of administration. Sec. 64b (3).
(4) Wages. Sec. 64b (4).
(5) Debts entitled to priority by the laws of the United States or of the various states, such as attachment costs. Sec. 64b (5).
(6) Taxes. Sec. 64a.
(7) General creditors.

We think the disposition of the case at bar turns upon the meaning of the words *"dividends to creditors"* used in Sec. 64a.

In the concluding paragraph of his opinion (Trans. of Record, p. 58), Judge Dooling, after referring to the case of

City of Richmond v. Bird (1919), 43 Am. B. R. 260, 249 U. S. 174, 39 Sup. Ct. 186,

wherein the Supreme Court stated that the word *"dividends"* as commonly used throughout the act, means partial payment to general creditors, states:

> "The ordinary rules of construction support the ruling of the referee. The taxes in question are given priority only over 'dividends to creditors.' Everywhere else in the act the word 'dividend' means a partial payment to general creditors. *There is no reason why a different meaning should be assigned to it here."* (Italics ours.)

In their opinion, the Circuit Court of Appeals say (Trans. of Record, p. 62):

> "It is true that the term 'dividend to creditors' ordinarily refers to dividends to general creditors, but it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors."

What provisions are contained in the act that support these respective views?

Sec. 1a (9), which defines the term "creditor," is as follows:

> "Creditor shall include anyone who owns a demand or claim provable in bankruptcy * * ."

Sec. 1a (11):

> "Debt shall include any debt, demand or claim provable in bankruptcy."

Sec. 39a (1):

> "Referees shall declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable."

Sec. 47a (9):

> "Trustees shall * * * pay dividends within ten days after they are declared by the referees."

Sec. 53a:

> "The Attorney-General shall annually lay before Congress statistical tables showing for the

whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important."

Sec. 56a:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

Sec. 56b:

"Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess."

Sec. 57e:

"Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities."

Sec. 57h:

"The value of securities held by secured creditors shall be determined by converting the same

into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

Sec. 57-1:

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof is rejected only in part."

Sec. 58a (5):

"Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the cases by the creditors, unless they waive notice in writing, of * * * the declaration and time of payment of dividends * * * ."

Sec. 65a:

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Sec. 65c:

"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends;

but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends."

Sec. 65d:

"Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts."

While it is to be noted that in the sections we have quoted the word "dividend" is not defined, still the language contained in Sec. 65a,

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured,"

is equivalent to a definition to the effect that "dividend" means partial payments to general creditors. We find that nowhere in the act is the word "dividend" referred to in any manner other than as partial payment to general creditors.

We cannot find anything in the act that indicates that payments on claims which are to be paid in full are to be treated as dividends to creditors within the meaning of Sec. 64a. Lending strength to the distinction between dividends to be paid to general creditors and payments to creditors who are to be

paid in full are the provisions of Secs. 56a, 56b and 57 to the effect that creditors who are to be paid in full or are secured have no voice in voting upon matters concerning the administration of the estate.

In *City of Richmond v. Bird,* supra, the Supreme Court notes particularly Sections 65b and 64a. The court, at page 262 of 43 Am. B. R. states:

> "Sec. 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend' as commonly used throughout the act means partial payment to general creditors. In Sec. 65b (Comp. St., Sec. 9649), for example, the word occurs in contrast to payment of debts which have priority."

Before the bankrupt estate is ready to pay dividends to general creditors, its property must be sold and all payments required by Sec. 64 completed. If Congress intended that taxes should precede the payments required by Sec. 64b, or some of them, why were the words "in advance of dividends to creditors" used? There is apparently no purpose in their use except to indicate that taxes are to be paid just prior to payments to general creditors, because the words "in advance of" really mean "next preceding", so that, if we give Sec. 64a this construction, it would read, in the light of the expression of the Supreme Court in *City of Richmond v. Bird,* supra:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality *next preceding partial payments to general creditors.*"

The Circuit of Appeals in its decision, while referring to the language of the Supreme Court in *City of Richmond v. Bird,* supra, relies upon the following language in the prior Supreme Court case of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.* (1912), 224 U. S. 152, 27 Am. B. R. 873, 32 Sup. Ct. 457, 56 L. ed. 706, wherein the court, at page 879 of 27 Am. B. R., said:

> "Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality'. "

It seems to us that the Supreme Court in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, in saying that the only exception is taxes, had in mind the words of subdivision (b) of Sec. 64: "the debts to have priority *except as herein provided.*" Sec. 64 contains no exception unless it be taxes. We think that the Supreme Court, not having before it the matter of an exact construction of the words "in advance of dividends to creditors," thought that the words "except as herein provided" referred to the taxes specified in subdivision (a). If the words "except as herein provided" in fact refer to taxes, the whole provision becomes ambiguous, because, if reference is to taxes, there would be no necessity of placing in subdivision (a) the words "in advance of payment of dividends to creditors." If such exception is not contained in Sec. 64, but

reference is made to other provisions of the act, the whole Sec. 64 becomes harmonious.

It is conceded in the case at bar that costs of preserving the estate, and expenses of administration, take precedence over taxes. If the words of subdivision "b," "except as herein provided" refer to the taxes specified in subdivision "a," where are taxes to be placed in subdivision "b"? This must, of course, be somewhere after subdivision (3), as the priority of (1), (2) and (3) are conceded. The wages in question in the case at bar are covered by subdivision (4). Therefore, if the decision of the Circuit Court of Appeals is correct, the place for taxes is between (3) and (4). If taxes are superior to (4) then they are also prior to (5) which embraces a debt due the government.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.

The Supreme Court, in that case, directly decided that labor claims are prior to a debt due the United States. If it was the intention of Congress to place taxes between (3) and (4) it would be hard to conceive of a more awkward way of expressing such intention. If such was the intention, the obvious and natural way would have been to insert the tax provision at (4) instead of wages. In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, the Supreme Court further states:

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt

national, state and individual, and assigns the order of payment."

What is this range of indebtedness and what is the order of payment? We would say:

First. Liens not affected by the act as covered by Sec. 67d. The Supreme Court, in *City of Richmond v. Bird,* supra, decides that taxes (where no lien is given by law therefor) are inferior to liens protected by Sec. 67d, which are superior to everything.

Second. The payments provided for, in the order fixed, in subdivisions (1), (2), (3), (4) and (5) of Sec. 64b.

Third. Taxes.

Fourth. General creditors.

The language of the Court of Appeals for the Third Circuit, in

New Jersey v. Lovell (1910), 24 Am. B. R. 562, 179 Fed. 321,

is enlightening:

"Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision

> for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes."

Later, in that decision, the court states that the question in the case at bar here was not decided, but the reasoning of the court certainly supports our position.

The point we desire to make plain here is that the words: "except as herein provided" do not refer to paragraph "a" relating to taxes, but to exceptions elsewhere found in the act, and especially embracing that very important class of debts not affected by the act and covered by Sec. 67d. viz., claims resting upon valid substantive liens. These words really mean *"except as in this act otherwise provided"*. Language is used elsewhere in the act similar to the words "except as herein provided," yet in none of these instances is an exception contained in the section in which the words appear, and in each case the apparent meaning of the words is "except as in this act otherwise provided. See Secs. 21 (b), 38 (4), and 56a.

We respectfully submit that the expression of the Supreme Court, in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, that the only exception is taxes is based upon the inadvertent assumption that the words "except as herein provided" refer to taxes, and was *obiter dicta*, and that the later expression of the court in *City of Richmond v.*

Bird, supra, (also stated by the Court of Appeals to be *obiter dicta*), is the correct construction of the act as to when taxes are payable.

There is nothing in the scheme of payment provided for by Sec. 64 which warrants the assumption that it was the intention of Congress to insert taxes between (3) and (4) of subdivision "b." If any doubt exists as to the order of payment that doubt is whether taxes precedes everything mentioned in "b" or follows everything therein.

There have been only a few decisions affecting the question at issue. *In the Matter of Enterprise Brass Foundry* (1923), 293 Fed. Rep. 69, Judge Neterer of the District Court for the Western District of Washington took Judge Dooling's view that wages should be paid ahead of taxes. *In the Matter of Kittenplan* (1922), 49 Am. B. R. 410, 285 Fed. 62, Judge Knox of the District Court for the Southern District of New York held that taxes were prior to labor claims. He referred to only a few of the cases bearing upon the question and relied on *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, and did not mention *City of Richmond v. Bird,* supra. *In the Matter of A. J. Waterman Mfg. Co.* (1923), 291 Fed. 589, Judge Hale for the District Court of the Southern District of Maine, held, although by way of dicta, that taxes were first. He did not discuss any of the cases bearing upon the question. *In the Matter of A. E. Fountain* (1924), 2 Am. B. R., N. S., 455, Judge Augustus N. Hand

of the District Court for the Southern District of New York held that taxes are to be paid prior to labor claims. He rests his decision upon the holding of the Circuit Court of Appeals in the case at bar, and accepts their interpretation of the effect of *City of Richmond v. Bird,* supra, and *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra.

Several early cases held that, inasmuch as "a" precedes "b", and taxes were not to be considered as debts, taxes were to be paid even in advance of expenses of administration. See

In re Prince and Walter (D. C. Pa. 1904), 12 Am. B. R. 675, 131 Fed. Rep. 546;

In re Weiss (D. C. New York, 1908), 20 Am. B. R. 247, 159 Fed. Rep. 295;

In re Cramond (D. C. N. Y. 1906), 17 Am. B. R. 22, 145 Fed. Rep. 966.

The case of *City of Chattanooga v. Hill* (C. C. A. 8th Cir. 1905), 15 Am. B. R. 195, 139 Fed. Rep. 600, is sometimes referred to as supporting this doctrine, but an examination of the case shows that the court expressly refrained from passing upon the question.

The later cases have all repudiated this doctrine. See

In re Halsey (D. C. N. J., 1909), 23 Am. B. R. 401, 163 Fed. Rep. 118;

State of New Jersey v. Lovell (C. C. A. 3rd Cir., 1910), 24 Am. B. R. 562, 179 Fed. Rep. 321;

In re Oxley (D. C. Wash. 1913), 30 Am. B. R. 406, 204 Fed. Rep. 826;

Polk County v. Burnes (C. C. A. 8th Cir. 1917), 40 Am. B. R. 727, 247 Fed. Rep. 399;

Matter of Jacobson (C. C. A. 7th Cir. 1920), 45 Am. B. R. 1, 263 Fed. Rep. 883;

In re General Film Corporation (C. C. A. 2nd Cir. 1921), 48 Am. B. R. 149, 274 Fed. Rep. 903;

In re Hessler Foundry & Mfg. Co. (Ref. N. D. N. Y., 1920), 45 Am. B. R. 382;

In re Wyley Co. (D. C. N. D. Ga., 1923), 292 Fed. Rep. 900;

In re Baltimore Pearl Hominy Co. (D. C. Md., 1923), 294 Fed. 921;

In re A. J. Waterman Mfg. Co. (D. C. Me. S. D., 1923), 291 Fed. 589;

In re A. E. Fountain (D. C. N. Y. S. D., 1924), 2 Am. B. R. N. S. 455.

As was said in *Matter of Jacobsen,* supra, it is hardly conceivable that Congress would confer upon the bankruptcy court the power to sequester and preserve property and administer bankrupt estates and yet deny to the court the power to protect its officers in the performance of their duties, notwithstanding such performance of duties and such administration of the insolvent estate is for the benefit of the taxing powers even more than it is for the general creditors, by reason of the priority given taxes over the claim of general creditors.

2. SEC. 3466, REVISED STATUTES, HAS NO APPLICATION.

This section is continually referred to and relied upon by the United States Government in its claims for taxes filed against bankrupt estates, but it has no application as it has been superseded by the Bankruptcy Act. This section would apparently give priority to tax claims over labor claims, and provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall first be satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The following cases hold that the section does not apply to bankruptcy proceedings:

Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., supra;
In re Fountain, supra;
In re A. J. Waterman Mfg. Co., supra.

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3. THE QUESTION OF PRIORITY BETWEEN SOVEREIGN AND SUBJECT IS NOT INVOLVED.

The soverign has enacted its own bankruptcy laws and instituted its own bankruptcy courts. The Con-

stitution of the United States gives Congress concurrent powers to impose and collect taxes and to establish a uniform bankruptcy law, and if Congress, in exercising these powers, establishes certain priorities of payment, and relegates taxes to an inferior position, no one can be heard to complain because Congress is only doing what the soverign gave it the right to do.

In the Bankruptcy Act of 1898, Congress departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The sovereign is expressly referred to in Sec. 64a of the act and this section is binding upon the various governments because they are named therein.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., supra;
In re Hessler Foundry & Mfg. Co., supra.
In re General Film Corporation, supra;
In re Wyley Co., supra.

In the case of *in re Wyley Co.,* supra, Judge Sibley for the District Court for the Northern District of Georgia, said at page 901 of 292 Fed. Rep.:

> "Taxes due the United States and bankruptcies are alike wholly subject to the power of Congress. Congress may make such provision for the one through the other as it sees fit. A tax has such lien and priority, and only such, as is given it by statute. 37 Cyc. 1138, 1143. The common-law preference of the sovereign is said not to exist in favor of the United States,

save as continued by statutes. United States v. Bank of North Carolina, 6 Pet. 29, 8 Law. Ed. 308."

See also

In re Baltimore Pearl Hominy Co., 294 Fed. 921, 924.

In the case of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, Justice McKenna said on behalf of the Supreme Court (p. 879 of 27 Am. B. R.):

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. *The policy which dictated it was beneficent and might well induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.*" (Italics ours.)

In that case the Supreme Court finds that the Bankruptcy Act of 1898 departs very considerably from the Bankruptcy Act of 1867, and expresses a new intent. Debts owing to the government are to be subordinated to labor claims. If such intent appears, we see no distinction between obligations due the government for a debt or for a tax.

In that case, the question at issue was whether a debt due the United States had priority over a labor

claim. The government contended that its claim superseded other claims as it was the claim of the sovereign, while the labor claimant asserted that his claim was covered by Sec. 64b (4), that of the government by Sec. 64b (5), and his section was prior. The court held with the labor claimant. It is difficult to see how there is any difference between taxes due the United States and a debt due the same. Both are obligations of the citizen, and, when paid, go to the support of the government. It is true that taxes are not dischargeable, while debts due the United States are, yet the situation is not altered because Congress has full power, under the rights conferred upon it by the Constitution relating to bankruptcies, to discharge one kind of obligation and decline to discharge another. See *in re Wyley Co.,* supra.

We believe that undue emphasis is attached to a tax claim as such. The government has not seen fit to even create a lien in favor of the tax involved in the case at bar, and, except for the provisions of the Bankruptcy Act, the claim of the government would be in the position of an ordinary creditor unless priority be given for taxes as a debt under Sec. 3466 R. S., supra, and if so given priority, would under the decision of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, be subordinated to labor claims.

If Congress had intended that tax claims should be paid before labor or attachment costs claims, it could have said so in so many words. The right to establish a uniform bankruptcy law throughout the United States having been conferred upon Congress by the Constitution, Congress has the power to treat tax claims in any manner that it may see fit so far as the distribution of the bankrupt estate is concerned, even to the extent of giving taxes priority over everything else or postponing them to everything else. The taxing powers have the right to make taxes a lien upon the property of the subject, but unless the taxing power by law creates such a lien which has attached to the property of the insolvent before he goes into bankruptcy, tax claims stand in no better position than claims of general creditors, except for such priorities as are established by the Bankrupt Act itself.

In the case at bar, it is conceded that no such lien exists and that the taxes have no priority except such as is given by Sec. 64a.

V.

CONCLUSION.

We submit that, in view of the foregoing considerations, Congress clearly intended and the Bankruptcy Act clearly provides that tax claims precede in order of payment only dividends to general credi-

tors and are inferior to labor claims and attachment costs claims, and the judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

REUBEN G. HUNT,
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LOUIS V. CROWLEY,
OF COUNSEL.

Dated: May 1, 1924.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

A. J. OLIVER, AS TRUSTEE IN BANKRUPTCY of the Estate of West Coast Rubber Corporation, Inc. (a corporation), and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black, and Hugh V. Casserly, petitioners,

v.

UNITED STATES OF AMERICA (A SOVEREIGN CORPORATION) and City and County of San Francisco (a municipal corporation), respondents.

} No. 574.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION.

STATEMENT OF THE CASE.

In the bankruptcy matter of the West Coast Rubber Corporation, Inc., pending before A. B. Kreft, Esq., a Referee in Bankruptcy of the United States District Court for the Southern Division of the Northern

District of California, there were filed during the course of administration claims for manufacturers' excise tax and penalties due the United States Government, a claim for personal property taxes and penalties due the City and County of San Francisco, and a claim for labor wages.

Available assets were insufficient to pay all of the above claims in full, and the question arose as to which had priority. The construction of Sections 64 (a) and 64 (b) of the Federal Bankruptcy Act is the factor upon which the determination of the issue hinges. The former section directs the court to order the payment of—

> all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors.

while the latter section provides—

> The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt's estate * * * shall be [after payment of costs of preserving the estate, filing fees and costs of administration]; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months, etc.

The Referee handed down an order on April 7, 1922, which gave labor claims priority. This ruling received affirmation by the District Judge on July 8, 1922, but was reversed by the Circuit Court fo Appeals for the Ninth Circuit on July 2, 1923, the latter court holding that taxes should be paid first.

Petitioners' Claim.

Petitioners rest their prayer for certiorari from this court upon the following grounds:

That the phrase "dividends to creditors," as used in Section 64–a, means partial payment to general creditors, and as payment of taxes is directed to be paid prior to the payment of such dividends only, the intention was to give priority to all preferred claims mentioned in 64–b.

That the words "except as herein provided," as used in 64–b, really mean "except as in the act otherwise provided," and refer to liens not affected by the Act and which are protected by Section 67–d of the Act and must be recognized in distribution of the estate.

ARGUMENT.

Though the term "dividends to creditors" ordinarily refers to dividends to general creditors, it does not necessarily have such a meaning. A dividend in bankruptcy is a sum of money to be shared among two or more creditors. It is not necessarily a partial payment, as suggested by petitioner, but may in some instances be a payment in full, even to general creditors.

That phrase "except as herein provided" refers unmistakably to taxes described in Section 64–a. The intention on the part of Congress to except "taxes" from the priority scale set forth in 64–b is apparent. If it intended otherwise, why were the two subjects segregated and given two separate sub-

divisions in the section in question? The construction of the above term suggested by petitioners clearly defeats the intention of the legislature.

This court has expressed itself relative to the proper construction of the section of the Bankruptcy Act under consideration in the case of *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.* (224 U. S. 152), wherein the following appears:

> Labor claims are given priority and it is provided that debts having priority shall be paid in full. *The only exception is taxes* legally due and owing by the bankrupt to the United States, state, county, district, or municipality. (Italics ours.)

The decision of the Circuit Court of Appeals for the Ninth Circuit, which is made the basis of the petitioners' contentions herein set forth, is strictly in line with those of other Federal Courts which have had occasion to pass upon the questions involved, as is indicated by the following citations:

In re Jacobson (263 Fed. 883), C. C. A. 7.

Polk County, Ia., v. *Burns et al.* (247 Fed. 399), C. C. A. 8.

Stanard v. *Dayton* (220 Fed. 441), C. C. A. 8.

State of N. J. v. *Lovell* (179 Fed. 321), C. C. A. 3.

City of Chattanooga v. *Hill* (139 Fed. 600), C. C. A. 6.

City of Waco v. *Bryan* (127 Fed. 79), C. C. A. 5.

Swarts v. *Hammer* (120 Fed. 256), C. C. A. 8.

In re Cramond (145 Fed. 966), N. Y.

In re Weissman (178 Fed. 115), Conn.
In re Weiss (159 Fed. 295), S. D. N. Y.
In re Flynn (134 Fed. 145), Mass.
In re Brinker (128 Fed. 634), W. D. N. Y.
In re Prince & Walter (131 Fed. 550), M. D. Pa.
In re Simms (118 Fed. 356), W. D. Ga.
In re Conhaim (100 Fed. 268), Wash.

The power to issue certiorari is exercised sparingly by this court, and only in cases where the circumstances show that questions of importance are involved or a diversity of decisions of lower courts is presented. (*Forsyth* v. *Hammond*, 166 U. S. 506). Admitting that this case is of importance to petitioners, it presents no question of gravity or general public importance upon which a conflict of judicial opinion exists. On the contrary, the decision of the Ninth Circuit to which petitioners take exception is in harmony with the principles established in every circuit that has so far considered the question. This includes all but two circuits of the United States.

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